

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

No. 74-1928

In the United States Court of Appeals
for the Second Circuit

INTERSTATE COMMERCE COMMISSION, PLAINTIFF-APPELLEE,

v.

AIRFREIGHT TRANSPORTATION CORPORATION OF NEW JERSEY, NEW DEAL DELIVERY SERVICE, INC. and EXPRESS/S.D.Z., INC., DEFENDANTS.

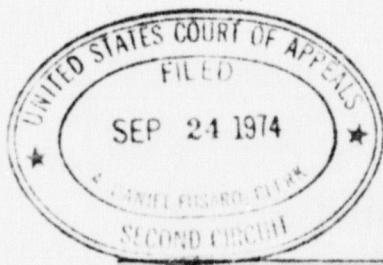
AIRFREIGHT TRANSPORTATION CORPORATION
OF NEW JERSEY, DEFENDANT-APPELLANT.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR APPELLEE

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INDEX

	Page
Statement of the Case	1
Applicable Statutes	3
Issues Presented	6
Argument:	
I. The District Court Did Not Abuse Its Discretion In Granting Permanent Injunctive Relief	6
II. The District Court Properly Committed The Matter To Its Discretion in Issuing The Injunctive Relief	9
III. The Injunctive Relief Was Not Too Broad	9
Conclusion	12

TABLE OF CASES

<i>Clifton Park Manor v. Mason</i> , 137 F. Supp. 324 (D. Del. 1955)	11
<i>Hecht Co. v. Bowles</i> , 321 U.S. 321 (1944)	8
<i>Hillsborough Investment Corporation v. Securities & Exchange Commission</i> , 276 F.2d 665 (1st Cir. 1960)	16
<i>Interstate Commerce Commission v. Barron Trucking Co.</i> , 276 F.2d 275 (3rd Cir. 1960)	8
<i>Interstate Commerce Commission v. Consolidated Freightways</i> , 41 F. Supp. 651 (S.D. N.D. 1941)	6
<i>Interstate Commerce Commission v. Pilot Freight Carriers, Inc.</i> , 189 F. Supp. 875 (D.D.C. 1960)	6, 11
<i>Interstate Commerce Commission v. Travelers Motor Freight, Inc.</i> , 195 F. Supp. 267 (N.D. W.Va. 1961)....	6, 11
<i>N.L.R.B. v. Express Publishing Co.</i> , 312 U.S. 426 (1941)	9, 10
<i>Paramount Pictures Corporation v. Holden</i> , 166 F. Supp. 684 (S.D. Cal. 1958)	11
<i>Securities & Exchange Commission v. Culpepper</i> , 270 F.2d 241 (2nd Cir. 1959)	7
<i>Securities & Exchange Commission v. Keller Corporation</i> , 323 F.2d 397 (7th Cir. 1963)	7
<i>Securities & Exchange Commission v. Manor Nursing Centers, Inc.</i> , 458 F.2d 1082 (2nd Cir. 1972)	6, 7, 8
<i>Securities & Exchange Commission v. Shapiro</i> , 494 F.2d 1301 (2nd Cir. 1974)	9
<i>Steward Stamping Corporation v. Westchester Products Co.</i> , 119 F. Supp. 92 (S.D. N.Y. 1953)	11
<i>Tri-State Motor Transit Co. v. International Transport Inc.</i> , 343 F. Supp. 588 (W.D. Mo. 1972)	11

II

Cases—Continued	Page
<i>Tri-State Motor Transit Co. v. Leonard Bros. Trucking Co., Inc.</i> , 347 F. Supp. 872 (W.D. Mo. 1972)	7
<i>United States v. W. T. Grant Co.</i> , 345 U.S. 629 (1953)..	7, 9
<i>United States v. Taystee Baking Co.</i> , 55 F. Supp. 490 (N.D. Tex. 1944)	11
 Statutes	
49 U.S.C. § 303(c)	2, 4
49 U.S.C. § 306(a)(1)	2, 5
49 U.S.C. § 309(a)	5
49 U.S.C. § 322(b)(1)	3, 6, 9

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BRIEF FOR APPELLEE

STATEMENT OF THE CASE

This action was instituted by the Interstate Commerce Commission (hereinafter Commission) upon the filing of a complaint on May 17, 1973, seeking the issuance of an

injunction to enjoin Airfreight Transportation Corporation of New Jersey (hereinafter Airfreight) from transporting property for-hire in interstate or foreign commerce as a motor carrier on public highways without a certificate of public convenience and necessity or permit issued by the Commission authorizing such transportation. The complaint also sought to enjoin New Deal Delivery Service, Inc. (hereinafter New Deal) and Express/S.D.Z., Inc. (hereinafter Express) from acting in concert and participating with Airfreight in the unlawful transportation.

The matter was tried before the Honorable Jacob B. Mishler, Chief Judge of the United States District Court for the Eastern District of New York, on the 25th and 26th of February 1974. In a memorandum decision issued April 19, 1974, Judge Mishler found that Airfreight had on thirty (30) occasions transported property from Jamaica, New York to either Stamford, Connecticut or Boston, Massachusetts. The district court concluded that this transportation was in violation of Sections 203(c) and 206(a)(1) of the Interstate Commerce Act (49 U.S.C. § 303(c), 306(a)(1)) because Airfreight did not possess Commission authority to transport property to Stamford, Connecticut or Boston, Massachusetts although it did hold authority to transport property between New York and certain points in New Jersey. (A 5a-11a)

The court further found that Express and New Deal acted in concert with Airfreight in committing the unauthorized transportation. The evidence established that shipments would arrive at John F. Kennedy International Airport, Jamaica, New York destined for either Clairol, Inc. in Stamford, Connecticut, or Northeast Airlines in Boston, Massachusetts. Thereupon an employee of Export-Import Services, Inc. would place an order for the transportation of the merchandise with Airfreight. The goods were then shipped by use of Airfreight equipment. Receipts for merchandise were executed on Air-

freight forms, freight charges were submitted on Airfreight invoices, and the freight charges were paid directly to Airfreight. After each shipment, Airfreight prepared false documents and reports in order to create the appearance that New Deal or Express leased the vehicles from Airfreight and performed the transportation services. (A. 8a-9a) The court found that New Deal knew Airfreight was not authorized to transport freight to these areas and knowingly participated in the violations. (A. 9a) Express failed to answer the complaint and was held to be in default. (A. 5a)

The Commission established at trial that the predecessor-in-interest to Airfreight, Airfreight Transportation Corporation was owned by Henry Bono and Nicholas Accardi, who are presently the principal officers of defendant Airfreight. The former corporation paid civil forfeiture penalties to the Commission in the amount of \$1,200.00 on February 17, 1970, and \$2,000.00 on April 9, 1971, for having engaged in unauthorized interstate transportation from John F. Kennedy Airport, Jamaica, New York. (Defendant's Admissions No. 49, 50, and 51.)

On May 10, 1974, the lower court issued an injunction permanently enjoining Airfreight from directly or indirectly transporting or holding out to transport property as a for-hire motor carrier in interstate or foreign commerce without appropriate Commission authority. The injunction also permanently restrained Express from aiding and abetting Airfreight in its illegal activity. (A. 12a-13a) A similar restraint was not issued against New Deal because it had ceased its illegal activities three months prior to the Commission's investigation and there was no inference that New Deal was likely to commit future violations. (A. 11a)

APPLICABLE STATUTES

Section 222(b)(1) of the Interstate Commerce Act (49 U.S.C. 322(b)(1)) provides as follows:

If any motor carrier or broker operates in violation of any provision of this chapter (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof), or any lawful rule, regulation, requirement, or order promulgated by the Commission, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply for the enforcement thereof to the district court of the United States for any district where such motor carrier or broker operates. In any proceeding instituted under the provisions of this subsection, any person, or persons, acting in concert or participating with such carrier or broker in the commission of such violation may, without regard to his or their residence, be included, in addition to the motor carrier or broker, as a party or parties, to the proceeding. The Court shall have jurisdiction to enforce obedience to any such provision of this part, or of such rule, regulation, requirement, order, term, or condition by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his or its officers, agents, employees, and representatives and such other person or persons, acting in concert or participating with such carrier or broker, from further violation of such provision of this part, or of such rule, regulation, requirement, order, term or condition and enjoining upon it or them obedience thereto. Process in such proceedings may be served upon such motor carrier, or broker, or upon such person, or persons, acting in concert or participating therewith in the commission of such violation, without regard to the territorial limits of the district or of the state in which the proceeding is instituted.

Section 203(c) of the Act (49 U.S.C. 303(c)) provides as follows:

Except as provided in section 202(c), section 203 (b), in the exception in section 203(a)(14), and in the second proviso in section 206(a)(1), no person shall engage in any for-hire transportation business

by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance of a primary business enterprise (other than transportation) of such person.

Section 206(a) of the Act (49 U.S.C. 306(a)) provides in part as follows:

Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: * * *

Section 209(a) of the Act (49 U.S.C. 309(a)) provides in part as follows:

Except as otherwise provided in this section and in section 210a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: * * *

ISSUES PRESENTED

1. Whether the district court abused its discretion in finding a reasonable likelihood that the violations will continue in the future?
2. Whether the district court properly committed the matter to its discretion in issuing the injunctive relief?
3. Whether the injunction is too broad in scope?

ARGUMENT**I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING PERMANENT INJUNCTIVE RELIEF.**

Section 222(b)(1) of the Interstate Commerce Act (49 U.S.C. 322(b)(1)) (hereinafter Act) provides that the district courts of the United States shall have jurisdiction to issue an injunction restraining any carrier violating the Act from committing further violations. The Commission in applying for injunctive relief need only show that the Act is being violated and that there is a reasonable likelihood that the violations will continue. *Interstate Commerce Commission v. Travelers Motor Freight, Inc.*, 195 F. Supp. 267 (N.D. W.Va. 1961). See also, *Securities & Exchange Commission v. Manor Nursing Centers, Inc.*, 458 F.2d 1082 (2nd Cir. 1972). There is no requirement that the Commission show an irreparable injury. *Interstate Commerce Commission v. Consolidated Freightways*, 41 F. Supp. 651 (S.D. N.D. 1941). Likewise, the fact that a defendant has paid civil forfeiture claims upon the same violations which are used to establish the necessity for an injunction is no bar to the action. *Interstate Commerce Commission v. Pilot Freight Carriers, Inc.*, 189 F. Supp. 875 (D.D.C. 1960).

A district court has broad discretion in issuing an injunction against a motor carrier's violation of its certificate of authority. *Tri-State Motor Transit Co. v. Leonard Bros. Trucking Co., Inc.*, 347 F. Supp. 872 (W.D. Mo. 1972). The lower court's determination that the public interest warrants an injunction should not be disturbed on appeal unless there has been a clear abuse of discretion. The party seeking to overturn the district court's exercise of discretion has the burden of showing that the court abused its discretion and that burden is necessarily a heavy one. *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953); *Securities & Exchange Commission v. Manor Nursing Centers, Inc.*, 458 F.2d at 1100; *Securities & Exchange Commission v. Culpepper*, 270 F.2d 241, 250 (2nd Cir. 1959).

The crucial issue presented by Airfreight in the instant case is whether the district court abused its discretion in determining that there was a reasonable likelihood that the Airfreight violations will continue in the future. This determination by the district court is well supported by the record and should not be disturbed on appeal.

The past conduct of Airfreight clearly gives the inference of a reasonable likelihood that the violations will continue. The payment of civil forfeitures in 1970, and 1971, by Airfreight's predecessor-in-interest for violations of engaging in unauthorized transportation from John F. Kennedy Airport did not deter the Airfreight owners, who were the principals of the predecessor corporation, from this similar unauthorized transportation. Rather, the Commission's previous enforcement actions have only resulted in Airfreight resorting to falsification of transportation documents to conceal those same persistent violations. This fraudulent past conduct gives rise to an inference of a reasonable expectation of continued violations. *Securities & Exchange Commission v. Keller Corporation*, 323 F.2d 397, 402 (7th Cir. 1963); *Securities & Exchange Commission v. Culpepper*, *supra*. Furthermore, Airfreight did not discontinue its unlawful conduct

until the Commission instituted its investigation, and the mere fact that the illegal activity ceased upon the commencement of the Commission's investigation is not a bar to an injunction enjoining violations. *Hecht Co. v. Bowles*, 321 U.S. 321, 327 (1944); *Interstate Commerce Commission v. Barron Trucking Co.*, 276 F.2d 275, 277 (3rd Cir. 1960). In view of these facts, the district court cannot be said to have abused its discretion in determining that there was a reasonable likelihood that Airfreight would continue its violations in the future.

Airfreight implies in its brief that the district court erred when it did not enjoin New Deal from its unauthorized activities but proceeded to issue an injunction against Airfreight. (Brief of Appellant p. 4) Airfreight misconstrues the district court's reasoning by assuming that the two defendants were treated differently before the court. The lower court unmistakably dismissed the action as to New Deal because it was "unable to find any reasonable likelihood of future violations by New Deal." (A. 11a) The court plainly contrasted the positions of New Deal and Airfreight. New Deal had ceased its illegal activities three months prior to the Commission investigation. Airfreight, on the other hand, had a history of previous violations and did not discontinue its activities until after the investigation was commenced. Consequently, the court concluded that there was little likelihood that New Deal would continue its unlawful activities, but there was a reasonable likelihood of Airfreight engaging in future violations. Obviously, the district court did not apply different standards to these defendants, and it cannot be said that the court abused its discretion.

The evidence shows that Airfreight's predecessor had committed previous violations of the Act of a very similar nature. Airfreight did not cease its activities until the Commission instituted an investigation to require Airfreight to discontinue its conduct. Consequently, the district court was warranted in concluding that there was a reasonable likelihood of the violations continuing in the future.

II. THE DISTRICT COURT PROPERLY COMMITTED THE MATTER TO ITS DISCRETION IN ISSUING THE INJUNCTIVE RELIEF.

It is a well settled principle of law that the issuance of an injunction authorized by statute is committed solely to the discretion of the trial judge. *United States v. W.T. Grant Co., supra; Securities & Exchange Commission v. Shapiro*, 494 F. 2d 1301 (2nd Cir. 1974). Airfreight, however, erroneously alleges that the district court was unaware or misinterpreted this principle and issued the injunction out of a belief that an injunction was mandatory under Section 222(b)(1). The district court's memorandum opinion illustrates to the contrary that the court did realize that the issuance of the injunction was discretionary to the court and not mandatory. Therein, the district court set down governing guidelines for its discretion including a recital of prevailing authority holding injunctive relief to be discretionary. See, *Securities & Exchange Commission v. Shapiro, supra; Securities & Exchange Commission v. Manor Nursing Centers, Inc., supra*. Furthermore, the trial court's awareness of its discretion is apparent because it exercised that very discretion by granting the injunction as to Airfreight and refusing to grant an injunction as to New Deal. If the court really believed it had no discretion under the statute it would also have granted the injunction as to New Deal. Nowhere in the record can it be shown that the court found a mandatory duty upon it to issue an injunction under Section 222(b)(1).

III. THE INJUNCTIVE RELIEF WAS NOT TOO BROAD IN SCOPE.

The principle controlling in regard to the appropriate breadth of injunctive relief is expressed in *N.L.R.B. v. Express Publishing Co.*, 312 U.S. 426 (1941). *Hillsborough Investment Corporation v. Securities & Exchange*

Commission, 276 F. 2d 665, 668 (1st Cir. 1960). In *Express Publishing*, the Supreme Court announced:

A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past. 312 U.S. at 435.

In view of this rule, the district court was justified in issuing an injunction enjoining Airfreight from future transportation without an appropriate certificate of public convenience and necessity or permit issued by the Commission.

The district court found that Airfreight was transporting goods between John F. Kennedy Airport, Jamaica, New York and Stamford, Connecticut or Boston, Massachusetts. The evidence further established that Airfreight's predecessor had engaged in unauthorized transportation on other occasions which resulted in two Commission enforcement actions. Hence, under the *Express* rule the court should restrain violations of the same class or all transportation without an appropriate certificate of public convenience and necessity or permit issued by the Commission.

The past conduct and repeated violations of Airfreight reveal that nothing short of such injunctive relief would suffice. An injunction only restraining future operations from Jamaica, New York to Stamford, Connecticut or Boston, Massachusetts would not protect the public interest and deter other possible transportation by Airfreight. The district court did not abuse its discretion by enjoining all future uncertificated transportation.

None of the cases cited by Airfreight at the conclusion of its brief relate, even remotely, to the point raised, namely the scope and breadth of injunctive orders. *Tri-State Motor Transit Corporation v. International Trans-*

port, Inc., 343 F. Supp. 588 (W.D. Mo. 1972)¹ and *Interstate Commerce Commission v. Travelers Motor Freight, Inc.*, 195 F. Supp. 588 (N.D. W.Va. 1961), are both in support and in harmony with the decision of the district court. Both the *Tri-State* and *Travelers* courts held that an injunction should issue if a reasonable likelihood that violations will continue exists.

In *Interstate Commerce Commission v. Pilot Freight Carriers, Inc.*, 189 F. Supp. 875 (D.D.C. 1960)² an injunction was not issued for the reason that the defendant had taken steps of a permanent character to prevent a repetition of certain violations. The principle of that case is wholly distinguishable from the case at bar.

The Airfreight brief refers to *Bechik Products v. Flexible Products*, 225 Fed. Supp. 603. This case has been incorrectly cited and cannot be located by the appellee.

The next four cases cited by Airfreight are simply not relevant to any issue in the case. The *Clifton Park Manor v. Mason*, 137 F. Supp. 324 (D.Del. 1955) decision merely recites an equity maxim that equity will not enjoin an act which is not about to take place. The *Paramount Pictures Corporation v. Holden*, 166 F. Supp. 684 (S.D. Cal. 1958), decision deals with interlocutory injunctions, irreparable injury and the adequacy of remedies at law. *Stewart Stamping Corporation v. Westchester Products Co.*, 119 F. Supp. 92 (S.D. N.Y. 1953) involves a patent infringement wherein the court held that an injunction is not available at equity to punish acts already committed by a party. The *United States v. Taystee Baking Co.*, 55 F. Supp. 490 (N.D. Tex. 1944) decision relates to a corporation's responsibility for the acts of its bread

¹ The Airfreight brief incorrectly cites this case as *Tri-State Motor Transit Corporation v. International Transport, Inc.*, 843 Fed. Supp. 588.

² The Airfreight brief incorrectly cites this case as *Interstate Commerce Commission v. Pilot Freight Carriers, Inc.*, 189 Fed. Supp. 373.

salesman in illegally repossessing bread. While these cases involved applications for injunctions, a fair reading thereof shows no relevancy to any issue in the subject case.

CONCLUSION

The order of injunctive relief as issued by the trial court is sustained by the weight of the evidence and the applicable law governing applications for such relief. The district court did not abuse its discretion in issuing the injunction. Wherefore, the judgment of the trial court should be affirmed in all respects.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing brief upon all parties by mailing copies thereof to all attorneys of record.

Dated this 23rd day of September, 1974.

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